

POH YANG HONG

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v.

NG LAI YIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR

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SU GEOK YIAM J

[CIVIL SUIT NO: S4-21-191-2008]

3 JUNE 2013

PUBLIC AUTHORITIES: *Registrar of Titles - Breach of statutory duty - Negligence - Failure to maintain true and accurate records of particulars of land - Whether plaintiff suffered loss and damages as a result of second defendant's negligence - Whether second and third defendants could invoke and rely on acts of fraudster to protect themselves from liability - Whether second and third defendants liable for losses suffered by plaintiff - Whether second and third defendants legally bound to compensate plaintiff - National Land Code, ss. 22, 386 & 434*

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LAND LAW: *Sale of land - Registrar of Titles - Breach of statutory duty - Negligence - Failure to maintain true and accurate records of particulars of land - Whether plaintiff suffered loss and damages as a result of second defendant's negligence - Whether second and third defendants could invoke and rely on acts of fraudster to protect themselves from liability - Whether second and third defendants liable for losses suffered by plaintiff - National Land Code, ss. 22, 386 & 434*

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By a sale and purchase agreement entered into between the plaintiff and the first defendant ('the SPA'), the plaintiff had covenanted to purchase the land GRN 232, Lot 349, Section 71 Bandar Kuala Lumpur ('the land') for a total consideration of RM4,451,160 ('the purchase price'). Prior to the execution of the SPA and the search which was conducted on the land at the office of the Registrar of Titles ('the second defendant'), the plaintiff had paid a sum of RM89,023.23 to the first defendant's solicitors as earnest deposit and upon execution of the said SPA, the plaintiff paid another sum of RM356,092.80 to the first defendant's solicitors. Whilst the memorandum of transfer and the other documents which were necessary to effect the transfer and charge of the land were pending registration by the second defendant, the plaintiff discovered that the land was in fact held under the description PN 20992, Lot 349, Bandar Kuala Lumpur and was registered to one Mohamad Nor. The plaintiff then conducted official searches of both titles at the second defendant's office and found that the land held under GRN 232

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- A was registered to the first defendant and that the land held under title PN 20992 was registered to the said Malay man (there were two different and opposed particulars of registration of the same land). The plaintiff had purchased the land based on the representations of the first defendant in the SPA, including the
- B representation that the first defendant was the registered proprietor of the land at all material times. Since the first defendant was not the owner of the land at the date of the SPA, the consideration for the payment of the full purchase price by the plaintiff had wholly failed as the first defendant could not transfer
- C the land to the plaintiff. Hence, the plaintiff filed this suit against the defendants. The plaintiff claimed against the first defendant for losses amounting to RM1,951,160 paid to the first defendant by the plaintiff towards the purchase price and alleged negligence as against the second defendant for failing to maintain true and
- D accurate records of the particulars of the land. The plaintiff also alleged vicarious liability as against the Government of Malaysia ('the third defendant') for the negligence of the second defendant who was a public officer and a servant/agent of the third defendant. The issues that arose for determination were, *inter alia*,
- E (i) whether the second defendant was in breach of its statutory duties under the National Land Code ('NLC') and owed a duty of care to the plaintiff; (ii) whether the plea of fraudulent title and/or fraud on the part of any third party (who in the instant case is unknown) could, either on the facts and/or in law constitute a
- F defence to the second and third defendants; (iii) whether s. 22 of the NLC could be of any avail to the second and third defendants to absolve themselves from liability to the plaintiff; (iv) whether the second and third defendants were liable to the plaintiff for the sums of RM89,023.23 and RM356,092.80 respectively, which
- G were paid out by the plaintiff to the first defendant without reliance on any search at the office of the second defendant.

Held (allowing plaintiff's claim on liability against second and third defendants):

- H (1) The second defendant was a public officer and an agent/servant of the third defendant and was charged with the statutory duty to maintain a register of all lands caused to be registered at the Land Registry. The second defendant must
- I be taken to have known that the members of the public depended on him and his officers to ensure that what was contained in the register was correct and accurate since they had no other way or means of ensuring that they can obtain

accurate and reliable information except from him and his officers. Therefore, by virtue of the relationship of proximity between the second and third defendants and the other members of the public who wish to search the register to obtain reliable and accurate information, it was reasonably foreseeable to the second and third defendants that if the register contained incorrect or inaccurate information or false information, there was a real risk and danger that the members of the public could suffer loss and damages as a result of relying on and acting on that information contained in the register. Thus, the second and third defendants owed the plaintiff a duty of care. (paras 66 & 68)

- (2) The second defendant must take all reasonable steps to ensure that the register contained only correct and accurate information failing which, the second defendant must be held to have breached his duty of care to the member of the public concerned and if the aggrieved person had suffered losses and was able to prove his losses which could be quantified and were not too remote, then the second defendant was legally bound to compensate him. Herein, there was a clear breach by the second defendant of the statutory duty imposed upon him by the NLC and he was clearly negligent because the search, *albeit* a private search, which was conducted pursuant to s. 384 of the NLC, by the plaintiff's solicitors on 18 September 2007, disclosed that the first defendant was the registered proprietor of the land at the material time. The plaintiff had proved, on a balance of probabilities, that he had suffered losses amounting to RM4,362,893.24 as a result of the second defendant's negligence. (para 68)
- (3) The second and third defendants asserted that they were not liable for the losses suffered by the plaintiff because of the existence of the forged title bearing the description GRN 232 which they alleged was caused by the act/conduct of a third party. However, there was no evidence from the second defendant that he and his officers had taken all the necessary precautions in order to prevent the fraudster, who had not been established by the second and third defendants to be in actual fact a third party instead of an officer/staff of the second defendant, from creating the fake or fraudulent title. The second and third defendants ought not to be allowed to invoke and to rely on the act or acts of the fraudster to protect the second defendant from liability against the

- A plaintiff's claim. To decide otherwise would be unfair and unjust to the plaintiff who have had to suffer loss and damages through no fault of his own. What had transpired herein was the responsibility of the second defendant even though it was an unknown third party which had caused the
- B creation of the fake or fraudulent title because the registration of the particulars in the second defendant's records was the responsibility of the second defendant. (paras 71 & 72)
- C (4) There is nothing in s. 386 of the NLC which expressly excludes the liability of the second defendant in his official capacity in cases where the person who has requisitioned a private search had acted in his detriment in relying on the result of the search carried out by the officer or staff of the second defendant. The section merely provides that any
- D purchaser of any alienated land, or any share or interest therein, who suffers any loss or damage or damage by reason of any error in, or omission from, any certificate of search shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of s. 434. In the
- E absence of such a statutory exclusion clause, and since the NLC embodies the Torrens system of registration of land, the second defendant must be held liable to the plaintiff for the losses suffered by the plaintiff flowing from the breach of the second defendant's duty of care to the plaintiff in the
- F discharge and performance of the statutory duty which was imposed on the second defendant by the NLC to maintain a register of all lands caused to be registered at the Land Registry. (paras 90 & 91)
- G (5) This suit was brought by the plaintiff against the second defendant in his official capacity and not in his personal capacity. This was clear from the description of the second defendant by reference not to his name but to his designated official position and office. Hence, upon an ordinary and literal
- H construction and interpretation of s. 22 of the NLC, the protection which was contained in that provision would only apply if the plaintiff had sued the second defendant in his personal capacity by citing his personal name. (para 96)
- I (6) Since the first payment of RM89,023.23 (being the 2% of the purchase price) was made by the plaintiff even before he had conducted any search on the land at the office of the second defendant, it was crystal clear that he alone must bear his loss of the payment. The second defendant could not have been

said to be negligent because at that point in time, the plaintiff did not rely on any information whatsoever, provided by the second defendant, which could be said to have influenced or induced the plaintiff to act upon it to his detriment. Therefore, the second and third defendants did not cause the plaintiff to suffer the loss of the first payment as they did not owe the plaintiff any duty of care let alone breach their duty of care to the plaintiff. However, since the second payment of RM356,092.80 (being 8% of the purchase price) was made upon the execution of the SPA (and the receipt of this sum had been expressly acknowledged by the first defendant) by the plaintiff after his solicitors had requisitioned the private search on the land on 18 September 2007 at the office of the second defendant, the second and third defendants must bear his loss of the payment. (paras 98)

[Order accordingly.]

Case(s) referred to:

Caparo Industries Plc v. Dickman and Others [1990] 2 AC 605 (**refd**)

Damodaram v. Choe Kuan Him [1980] AC 497 (**refd**)

Ministry of Housing and Local Government v. Sharp and Another [1970] 2 QB 223 (**dist**)

Oh Hiam & Ors v. Tham Kong [1980] 1 LNS 53 (**refd**)

Pendaftar dan Pemeriksa Kereta-Kereta Motor, Melaka & Ors v. KS South Motor Sdn Bhd [2000] 2 CLJ 573 CA (**fol**)

Legislation referred to:

Evidence Act 1950, s. 101

National Land Code, ss. 22, 384, 385, 386, 434

Rules of the High Court 1980, O. 14A, O. 34

Land Charges Act 1925 [UK], s. 17(3), (5)

For the plaintiff - N Chandran (V Vijakumar & Noriza Rosli with him); M/s Albar & Partners

For the 2nd & 3rd defendants - Narkunavathy Sundareson (Kong Siew Chuo with her); SFCs

[Editor's note: For judgment of Lee Swee Seng JC on the plaintiff's O. 14A application (since reversed by the Court of Appeal), please see [2010] 8 CLJ 323]

Reported by Suhainah Wahiduddin

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JUDGMENT**Su Geok Yiam J:****Decision Of Court**

B [1] In this suit filed by the plaintiff against the three
defendants, at the conclusion of the full trial and having heard the
submissions of both parties, the court allowed the plaintiff's claim
on liability against the second and third defendants for the sum of
C RM4,006,000.44 with interest at 5% per annum with costs of
RM100,000.

[2] Being dissatisfied with the decision of the court, the second
and third defendants have filed a notice of appeal to the Court of
Appeal dated 8 February 2013.

D [3] Being dissatisfied with the decision of the court in not
granting the plaintiff the whole of the sum of RM4,451,160
claimed as damages in tort, the plaintiff has filed a cross-appeal to
the Court of Appeal dated 12 April 2013.

E [4] The grounds of the cross-appeal are firstly, the court ought
to have granted to the plaintiff judgment for a sum of
RM89,023.23 being 2% of the deposit in respect of the purchase
of the land as per the SPA and secondly, the court ought also to
have granted judgment to the plaintiff for another sum of
F RM356,092.80 being the balance 8% of the 10% deposit for the
purchase of the land as per the SPA which was paid *vide* the
letter from the plaintiff's solicitors dated 27 September 2007
thereby rendering the total sum awarded to the plaintiff in the
judgment of the court being RM4,451,160 (instead of
G RM4,006,044).

Reasons For The Decision Of The Court

[5] Below are the reasons why the court allowed the plaintiff's
claim with costs of RM100,000 against the second and third
H defendants.

Background

[6] Firstly, I shall deal with the background of the plaintiff's
I suit against all the three defendants.

[7] It is as follows:

- (1) By a sale and purchase agreement dated 8 October 2007, entered into between the plaintiff of the one part and one Ng Lai Yin (the “first defendant”), of the other part (the “SPA”), the plaintiff had covenanted to purchase the land known as GRN 232, Lot 349, Section 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan, Kuala Lumpur (the “land”) for a total consideration of RM4,451,160 (the “purchase price”).
- (2) Prior to the preparation and execution of the SPA, the plaintiff had, through his solicitors, Messrs Albar & Partners of 6th Floor, Faber Imperial Court, Jalan Sultan Ismail, 50250 Kuala Lumpur (the “plaintiff’s solicitors”) caused a land search to be conducted at the Land Registry, Wilayah Persekutuan, Kuala Lumpur, for the purpose of ascertaining the true and actual description of the title to the land, and also to obtain the particulars of the registered proprietor of the land.
- (3) As per the particulars of that search which was conducted on 18 September 2007, the description in regard to the title to the land was given as GRN 232, the number of the lot to which the title relates was given as 349, Section 71 and the registered proprietor was given as the first defendant, ie, the vendor in the SPA.
- (4) The particulars of the search are evidenced by a document issued by the Land and Mines Department, Kuala Lumpur, Wilayah Persekutuan, Kuala Lumpur (see pp. 1 and 2 of bundle B).
- (5) It is stated in the title to the land dated 27 March 2008 (see pp. 5 and 6 of bundle C) that the vendor is the registered proprietor of the land, having been so registered from 4 June 1989.
- (6) Prior to the execution of the SPA and the search which was conducted on the land at the office of the second defendant, the plaintiff had paid a sum of RM89,023.23 to the first defendant’s solicitors as earnest deposit on 28 August 2007.
- (7) Upon the execution of the SPA on 8 October 2007, the plaintiff paid another sum of RM356,092.80 to the first defendant’s solicitors.

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- A (8) This was followed by two payments of RM1 million and RM506,044, respectively, to the first defendant's solicitors on 5 December 2007.
- B (9) The plaintiff, subsequently, obtained a loan from the HSBC Bank Malaysia Berhad ("HSBC") for a sum of RM2,500,000 (the "loan sum") to part finance the purchase of the land.
- C (10) The security documents in respect of the loan were prepared by HSBC's solicitors, Messrs Nik Hussain & Partners of 27th Floor, Menara Promet, Jalan Sultan Ismail, 50250 Kuala Lumpur and the plaintiff executed the said security documents as the borrower/chargor, in the presence of HSBC's solicitors, and the signature of the plaintiff in the said security documents was attested by a solicitor of HSBC's firm of solicitors.
- D (11) The memorandum of transfer and other documents executed by the parties to the SPA and the parties to the loan agreement to put into effect the transfer and charge of the land were presented to the second defendant's office on 11 February 2008.
- E (12) The loan sum was then released by HSBC through HSBC's solicitors to the Vendor's solicitors, Messrs T Lall & Associates of Wisma Elise at No. 17-2 & 17-3, Jalan PJS 8/12, Dataran Mentari, 46150 Petaling Jaya, Selangor (the "vendors' solicitors") *vide* HSBC's solicitors' letter dated 19 February 2008 (see p. 32 of bundle B).
- F (13) On 10 March 2008, the solicitors for one Loh Kok Choy, Messrs Rajendran & Deen, had written to the Land Registry, Wilayah Persekutuan, Kuala Lumpur, informing the latter that they had the original title to the land in their possession and also that the latter should not proceed with the registration of the memorandum of transfer of the land in favour of the plaintiff because Loh Kok Choy had not, at any point in time, withdrawn his private caveat or had intended to so withdraw his private caveat over the land.
- G (14) As stated earlier, prior to the release of the loan sum by HSBC to the vendor's solicitors, the plaintiff had paid a total sum of RM1,951,160 on various dates from 28 August 2007 to 5 December 2007 towards part payment of the purchase price of the land (see p. 28 of bundle A and pp. 3, 5, 30, 31 and 43 of bundle B).
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- (15) Whilst the memorandum of transfer and the other documents which were necessary to effect the transfer and charge of the land were pending registration by the second defendant, the plaintiff discovered that the land was in fact held under the description PN 20992, Lot 349, Bandar Kuala Lumpur and was registered to one Mohamad Nor bin Mohamad. A B
- (16) The discovery had come about on 3 June 2008, when the plaintiff upon believing that the representations of the vendor to be true and/or the notification of the search conducted by his solicitors to be correct and, therefore, acting upon this belief that everything was in order with the SPA and the security documents, visited the land together with his architect with the intention of determining the manner on the development of the land. C D
- (17) However, on arrival at the site of the land, the plaintiff was asked to leave the land by a male Malay whose name the plaintiff, subsequently, discovered as being one Mohamad Nor bin Mohamad (the “said male Malay”), who claimed to be the owner of the land. E
- (18) The plaintiff’s solicitors then post haste conducted official searches of both titles at the technical division of the second defendant’s office on 4 June 2008 to investigate as to the alleged claim of ownership of the land by the said male Malay. F
- (19) The plaintiff’s solicitors paid the requisite search fees to the Land Registry of the second defendant for the two official searches and much to their dismay the results showed as follows: G
- (a) that the land held under title GRN 232, Lot 349, Seksyen 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur was registered to the first defendant; and H
- (b) that the land held under title PN 20992, Lot 349, Seksyen 71, Bandar Kuala Lumpur was registered to one Mohamad Nor bin Mohamad, the said male Malay.
- (20) The plaintiff has, through his solicitors, put the first defendant’s solicitors and HSBC’s solicitors on notice of the two different and opposed particulars of registration of the land, as per the two sets of particulars registered with the Registry of Land Titles, Wilayah Persekutuan, Kuala Lumpur. I

- A (21) On 5 June 2008, the plaintiff lodged a report on the above state of affairs with the police at Jalan Bandar (HS Lee) Police Station.
- B (22) On 9 June 2008, the first defendant's solicitors had forwarded to the plaintiff's solicitors, a statutory declaration (the "SD") of the first defendant in which the first defendant had declared himself to be the registered and beneficial owner of the land as described in the SPA, ie, GRN 232 Lot 349, Seksyen 71, adding that the land had been alienated to him by the Kuala Lumpur Land Office through the services of a land alienation consultant by the name of How Yee Yah (NRIC No.: 550213-10-6359) (the "said How Yee Yah").
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- D (23) In the SD, the first defendant had further declared that he was paid a sum of RM500,000 for his services and that he had collected the balance of the purchase price for the land and had paid it in cash to the said How Yee Yah.
- E (24) The plaintiff had purchased the land on the basis of the representations of the first defendant in the SPA, including the representation that the first defendant is the registered proprietor of the land held under title GRN 232, Lot 349, Seksyen 71, at all material times, and in particular as at the date of the SPA.
- F (25) Since the first defendant is not the owner of the land at the date of the SPA the consideration for the payment of the full purchase price by the plaintiff had wholly failed as the first defendant could not transfer the land to the plaintiff.
- G (26) Hence, on 6 August 2008, the plaintiff filed this suit *vide* a writ of summons, encl. (1), together with a statement of claim ("SOC"), encl. (2), against all the three defendants.
- H (27) The plaintiff alleged as against the first defendant that the first defendant had falsely, knowingly and fraudulently misrepresented to the plaintiff that he was the registered proprietor of the land as at the date of the SPA and claiming as against the first defendant losses of a sum of RM1,951,160 paid to the first defendant by the plaintiff towards the purchase price, together with interest thereon, and a sum of RM2,500,000 being the repayment of the loan by the plaintiff to HSBC and interest thereon at the rate of Base
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Lending Rate (BLR) - 1.75% from 19 February 2008 to date of payment, in the event the plaintiff be held at some subsequent point in time that the plaintiff has a liability to make payment of the same to the bank, damages for breach of contract, damages in tort, cost and such further or other relief as this Honourable Court may deem fit.

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(28) The plaintiff alleged negligence as against the second defendant in that the second defendant has breached his duty of care to the plaintiff by misrepresenting the true and actual particulars of the land, that the second defendant has failed to maintain true and accurate records of the particulars of the land, that the plaintiff, in reliance on the incorrect information, has suffered losses.

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(29) The plaintiff alleged vicarious liability as against the third defendant for the negligence of the second defendant who is a public officer and a servant or agent of the third defendant.

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(30) The plaintiff is claiming as against the second and third defendants, damages in tort with interest, cost and such further or other relief as this Honourable Court may deem fit.

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Particulars Of Negligence On The Part Of The Second And Third Defendants As Pleaded By The Plaintiff

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[8] Secondly, I shall reproduce below the particulars of negligence on the part of the second and third defendants as pleaded by the plaintiff in para. 49(i) to (iii) of the plaintiff's SOC.

[9] These are as follows:

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(i) Failing to ensure that the particulars of the Land as per the registered records of the Land Registry, Wilayah Persekutuan, Kuala Lumpur [are] at all times accurate;

(ii) Failing to ensure that the particulars of the Land as per the registered records of the Land Registry, Wilayah Persekutuan, Kuala Lumpur and as furnished by the 2nd defendant to the plaintiff on payment of a fee, contain accurate details of the Land which can be relied upon by the Plaintiff;

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(iii) Maintaining inconsistent and/or contradictory entries in respect of particulars of land registered with the Registry and in consequence, providing members of the public, like the Plaintiff herein, information relating to the Land on which a

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- A search is conducted on payment of the requisite fee, and which information is not true or incorrect to the detriment of the member of the public making the search and relying thereon, like the Plaintiff herein.
- B [10] In para. 50 of his SOC, the plaintiff has pleaded that by reason of the second defendant's negligence, and/or its misrepresentation as to the true and actual particulars of the land, and/or the negligent misstatements as to the true particulars of the land, the plaintiff had suffered loss and damages.
- C **Events After The Filing Of The Plaintiff's Suit**
- [11] Thirdly, I shall deal with the events subsequent to the filing of the plaintiff's suit.
- D [12] These are as follows:
- (1) On 4 September 2008, the second and third defendants entered their appearance *vide* a memorandum of appearance, encl. (3A), filed by the Attorney-General's Chambers.
- E (2) On 11 December 2008, the second and third defendants filed their statement of defence ("defence"), encl. (5).
- F (3) The plaintiff served a copy of the writ of summons on the first defendant by way of substituted service, ie, by advertisement in "The New Straits Times" newspaper dated 16 April 2009, by posting on the notice board of the Kuala Lumpur High Court and by posting to the first defendant's last known address at No. 52B7, Merak Flat, Jalan Loke Yew, 55200 Kuala Lumpur.
- G (4) On 21 April 2009, the plaintiff filed an affidavit of the service of a copy of the writ of summons by way of substituted service on the first defendant.
- H (5) The first defendant did not enter any appearance to the plaintiff's writ of summons.
- I (6) On 21 May 2009, upon the plaintiff filing, on 8 May 2009, a certificate of non appearance by the first defendant, encl. (14), the learned Senior Assistant Registrar, granted to the plaintiff, judgment-in-default of appearance against the first defendant, encl. (15), for the following reliefs:
- (a) A sum of RM1,951,160;

- (b) Interest on the sum of RM1,951,160; A
- (c) A sum of RM2,500,000;
- (d) Interest on the sum of RM2,500,000 at the rate of BLR - 1.75% from 19 February 2008 to the date of payment; B
- (e) Damages for breach of contract;
- (f) Damages in tort; and
- (g) Cost of RM225 C
- (7) On 6 October 2009, the plaintiff applied to the court *vide* a summons-in-chambers, encl. (18) (the “O. 14A application”), pursuant to O. 14A of the Rules of the High Court 1980 and/or the inherent jurisdiction of the court for the determination by the court without the necessity of a full trial of 7 questions as set out in the Annexure and in the event that questions 1 - 3 and 5, 6 and a part of question 7 are answered in the positive and question 4 is decided in the negative, for judgment to be entered against the second and third defendants as per para. 54 of the plaintiff’s SOC and for assessment of damages taking into consideration the losses incurred by the plaintiff in respect of payments made by the plaintiff as per the SPA, ie, a sum of RM1,951,160 and a sum of RM2,500,000 and interest thereon as prayed for in para. 53(a) to (d) of the plaintiff’s SOC. D E F
- (8) On 6 November 2009, the second and third defendants successfully applied, *vide* a summons-in-chambers, encl. (21), to amend their defence by inserting a new paragraph, ie, para. 19A, to aver that the plaintiff has no cause of action in law (against them) as the second defendant is protected (immune) from any civil claims by virtue of s. 22 of the NLC 1965. G
- (9) On 27 July 2010, Lee Swee Seng JC (the “learned judge”) decided the plaintiff’s O. 14A application in favour of the plaintiff. H
- (10) The learned judge, consequently, granted judgment for the plaintiff against the second and third defendants for the following reliefs: I
- (a) A sum of RM4,451,160;

- A (b) Interest on the said sum at the rate of 8% per annum calculated from 27 July 2010 to the date of full settlement; and
- (c) Cost of RM15,000.
- B (11) Being dissatisfied with the decision of the learned judge, the second and third defendants successfully filed a notice of appeal against his decision.
- C (12) On 9 May 2011, the Court of Appeal comprising Suriyadi bin Halim Omar JCA (now FCJ), Jeffrey Tan Kok Wha JCA (now FCJ) and Abdul Wahab bin Patail JCA reversed the decision of the learned judge, ordered that the plaintiff's claim against the second and third defendants be determined in a full trial and remitted the case back to the Kuala Lumpur High Court for trial.
- D (13) Hence, the matter came before me for full trial on 10 September 2012.

Second And Third Defendants' Plead Case

- E [13] Fourthly, I shall deal with the second and third defendants' pleaded case as contained in their amended statement of defence ("amended defence"), encl. (23), filed on 30 March 2010.
- F [14] The second and third defendants' pleaded case is as follows:
- (1) They deny the whole of the plaintiff's claim and put the plaintiff to strict proof;
- G (2) They maintain that they do not owe any duty of care to the plaintiff;
- (3) They aver that the information supplied to the plaintiff was accurate according to the second defendant's records at the time it was provided;
- H (4) They assert that the plaintiff does not have a valid cause of action against them as they are protected from all civil suits (including the plaintiff's suit) by virtue of s. 22 of the NLC 1965;
- I (5) They assert that the plaintiff is not entitled to the reliefs sought against them by the plaintiff because they are not liable for the losses suffered by the plaintiff; and

- (6) They also assert that they are not liable for the losses suffered by the plaintiff because the existence of the forged title bearing the description GRN 232 was caused by the act/conduct of a third party. A

The Trial

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[15] Fifthly, I shall deal with the evidence which was adduced by the three parties at the full trial. The full trial took two days to complete.

[16] At the full trial which commenced on 10 September 2012, the plaintiff called two witnesses. They are Mr Poh Yang Hong, the plaintiff himself, as PW1 and Mr Azli bin Nordin, the advocate and solicitor from the legal firm of Messrs Albar & Partners, who acted for the plaintiff in the preparation of the SPA and who attested the signature of the plaintiff in the SPA, as PW2. C D

[17] The second and third defendants called one witness. He is Encik Mohd Azlan bin Mohd Radzi, the Assistant Director of the Registration Division of the Office of the Director of Lands & Mines of the Federal Territory of Kuala Lumpur, as DW1. E

The Plaintiff's Case

[18] The court found PW1 to be a truthful witness. His evidence was credible and consistent throughout. The court found that PW1 gave positive and cogent evidence which supported and confirmed his pleaded case. The court found that PW1's testimony which was supported by contemporaneous documents also confirmed the background of the case as set out earlier. F

[19] He identified P2 as the SPA, which was prepared by PW2, his solicitor from the legal firm of Messrs Albar & Partners, and which he and the first defendant had executed on 8 October 2007 for the sale and purchase of the land for a total consideration of RM4,451,160. G

[20] He testified that the first defendant was represented by the legal firm of Messrs T Lall & Associates and that this fact is specifically mentioned in cl. 1.6 of the SPA. H

[21] He testified that his solicitors requisitioned a private search on the title to the land on 18 September 2007, to verify and ascertain that the first defendant is the registered proprietor of the land and that the description of the land and the title were correct as claimed by the first defendant before he executed the SPA and I

- A paid a total sum of RM4,362,893.24 (which included a loan of RM2.5 million from the HSBC) being the balance purchase price for the land after having paid an earnest deposit of RM89,023.23 on 28 August 2007.
- B [22] He explained that the earnest deposit of RM89,023.23 representing 2% of the purchase price was paid by him personally on 28 August 2007 *vide* his cheque made payable to Messrs T Lall & Associates. He identified P19 as a copy of his cheque.
- C [23] The court noted that cl. 2.1.1 of the SPA has stated that this sum has been paid by the purchaser (PW1) prior to the execution of the SPA.
- D [24] He identified P3 as the extract of the search dated 18 September 2007 procured by his solicitors which relates to the very same land, the subject matter of the SPA.
- E [25] He identified P4 as the certified true copy of the issue document of title giving the title description of the land as that purchased by him pursuant the SPA and the registered owner of the land as Ng Lai Yin, the vendor (the first defendant) named in the SPA. The date of the certification is 27 March 2008 and the date of the registration stated in the grant issued to Ng Lai Yin is 4 June 1989.
- F [26] PW1 also explained that he made two payments for the sums of RM1 million and RM506,044, respectively, by way of his personal cheques. The two cheques were forwarded to the Vendor's solicitors, through PW1's solicitors and the balance sum of RM2.5 million was paid through a loan taken by him from the HSBC.
- G [27] He identified P5, as the duplicate copy of the letter from his solicitors dated 6 December 2007, forwarding the two cheques towards part payment of the total consideration sum. He identified P20 and P21, respectively, as the copies of the two cheques.
- H [28] He also identified P6 as the copy of the letter from the HSBC's solicitors, Messrs Nik Hussain & Partners, to the vendor's solicitors, on the release of the full loan granted to him by the bank after he had executed all the security documents in respect of the loan sum as stipulated in the letter from the HSBC addressed to him approving the loan.
- I [29] He identified P7 as the letter from the HSBC addressed to him approving the loan of RM2.5 million.

[30] He testified that in June 2008, he went to the land together with his architect to see how the land could be developed but he was asked to leave by Mohamad Nor bin Mohamad, a Malay gentleman, who claimed to be the registered proprietor of the land. A

[31] He left the land and decided to make further investigations based on what was informed to him by the Malay gentleman. He requisitioned a land search on a different description, namely, PN 20992 Lot 349 and procured a copy of the issue document of title as certified by the Registrar of Land Titles, dated 5 June 2008. It gave the description of the land as PN 20992 Lot 349 and the registered proprietor as Mohamad Nor bin Mohamad. B C

[32] He identified P8 as the official search result procured by him. He also identified P9 as a copy of the issue document of title certified by the Registrar of Land Titles, dated 5 June 2008. D

[33] He then handed over P8 to his solicitors. His solicitors then wrote a letter on his behalf to the second defendant putting him on notice of the two inconsistent entries in regard to the particulars and registered proprietorship of the same land. He identified P10 as a copy of his solicitors' letter. E

[34] His solicitors caused another search to be conducted, this time an official search, on GRN 232 Lot 349, Seksyen 71, Bandar Kuala Lumpur. The result of the official search also showed the registered proprietor of the land as Ng Lai Yin. He identified P11 as the copy of the official search issued on 4 June 2008 by the Registry of the second defendant. F

[35] Based on the two contradictory search results for the same piece of land, ie, Lot 349, Seksyen 71, Bandar Kuala Lumpur, PW1 lodged a police report on 5 June 2008 at the Jalan Bandar (HS Lee) police station, seeking a full investigation by the relevant authority of the very serious irregularity in the records of the Registry of the Kuala Lumpur Land Office. He identified P12 as his police report. G H

[36] He also identified P13 as a copy of a letter dated 9 June 2008 written by the vendor's solicitors which was forwarded to him by his solicitors together with a copy of an undated and unsigned statutory declaration ("SD") without a *jurat* purportedly made by the vendor. I

- A [37] PW1 has identified P14 as a copy of the vendor's SD. In the SD, the vendor said he is the registered and beneficial owner of the land known as GRN 232, Lot 349, Seksyen 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur; that the land was alienated to him by the Kuala Lumpur Land Office through the services of
- B a land alienation consultant named Mr How Yee Fah (NRIC NO.: 550213-10-6359); that on or about 12 February 2007 he collected the original title to the land from the Kuala Lumpur Land Office together with Mr How Yee Fah (NRIC NO.: 550213-10-6359) commonly known as Fatty Lau; that he did not know
- C that the land office issued the title fraudulently; that he did not participate in any fraud; that he was asked and paid a sum of RM500,000 by Mr How Yee Fah to sell the land to the plaintiff; that the total sale proceeds due to him were paid to him by cheques on 25 February 2008 by Messrs T Lall & Associates of
- D Wisma Elise, 17-2 & 17-3, Jalan PJS 8/12, Dataran Mentari, Bandar Sunway, 46150, Petaling Jaya who have advised him to refund all the monies received by him but he is not in a position to do so because he has paid the balance of the sale proceeds (after deducting a sum of RM500,000) in cash to the said
- E Mr How; and he is willing to help anyone to resolve the matter and will lodge a police report soon.

- [38] PW1 is claiming damages for the actual losses suffered by him against the second and third defendants for the breach of the
- F second defendant's duty of care to him in negligently conveying to him inconsistent information which has caused him to lose the land and the sum of RM4,451,160 which he has paid to the Vendor together with interest charged on the loan by the HSBC as he has been sued by the bank for the repayment of the loan sum
- G with interest accrued, interest on the judgment sum from the date of the filing of his action until the date of full payment and costs of the action.

- [39] PW1 claims that the second defendant owes him a duty of care in and about the discharge of his duties, in and about the
- H maintaining of the records of entries relating to land descriptions and registered proprietorships thereof, in the records of the Land Registry.

- [40] The court also found PW2 to be a truthful and honest
- I witness. The court found that PW2's evidence was consistent with and corroborated PW1's evidence.

Second And Third Defendants' Case

A

[41] DW1 gave evidence for and on behalf of the second and third defendants. Although the court found DW1 to be a truthful witness, the court found that his evidence did not support the second and third defendants' pleaded case. DW1's evidence was consistent throughout except for one glaring material inconsistency which suddenly cropped up in his re-examination. This is dealt with later.

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[42] DW1 informed the court that he has been attached to the Registration Division of the Director of Lands & Mines since 15 September 2004. He said that his duties included the registration of titles and other dealings on the titles to land including Strata Titles. He also said that he was responsible for the conduct of public auctions of land and the conduct of investigations relating to the issue of replacement titles arising from the loss of the original issue document of title.

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[43] DW1 said that the title GRN 232, Lot 349, Seksyen 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur, (the "fake or fraudulent title") had been wrongfully created in 2006 by an unknown third party.

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[44] Hence, both the searches, ie, private and official, which were conducted on title GRN 232 by the officer of the second defendant, upon being requisitioned by the plaintiff's solicitors, yielded the same results which were obtained by the plaintiff in the instant case, ie, that it is for the land situated at Lot 349, Seksyen 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur and that the first defendant is the registered proprietor of the land.

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[45] However, DW1 categorically said that only the second defendant and his officers had access to the database in the computer system of registration in the office of the second defendant and the register of the title to the land. Nevertheless he did not know how the unknown third party was able to create the fake or fraudulent title in the database of the computer system of registration in the office of the second defendant. I will deal with this point in more detail later.

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[46] DW1 also said that the second defendant was unaware of the existence of the fake or fraudulent title which was created in 2006 until he received a letter of complaint dated 10 March 2008 from the solicitors who were acting for Loh Kok Choy. The

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- A second defendant then immediately entered a Registrar's caveat on the fake or fraudulent title in order to prevent any further dealing in the fake or fraudulent title. This was followed by the lodging of a police report on 27 March 2008.
- B [47] According to DW1, the truth and reality of the matter is that the land which is situated at Lot 349, Seksyen 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur is actually held under title PN 20992 and that it is registered in the name of Mohd Nor bin Mohamad.
- C [48] Nevertheless, DW1 said that there was no truth to the allegations of negligence by the plaintiff in paras. 45 and 49(i) - (iii) of the plaintiff's SOC on the part of the second defendant. On this fact-in-issue the court had to respectfully disagree with him because he could not explain how the fake or fraudulent title
- D could have been created by an unknown third party when the Registry was clearly within the exclusive domain, control and responsibility of the second defendant and the second defendant's officers and staff.
- E [49] The court noted that in the instant case, DW1 was very candid and honest when he told the court that he did not have any knowledge regarding how the particulars of the land and the identity of the registered proprietor were registered or entered in the register of the title to the land, ie, GRN 232, Lot 349,
- F because he was not the officer who was in charge of the responsibility of carrying out and performing the statutory duty which was imposed on the second defendant by the NLC 1965, ie, the registration of the particulars of the land, the title and the identity of the registered proprietor in the database of the
- G computer system of registration in the office of the second defendant.
- [50] Nevertheless, he was directed by the second defendant to attend court and to give evidence on behalf of the second
- H defendant in the instant case. With respect the second defendant ought to have directed the desk officer who has personal knowledge of the matter to attend court to testify as a witness since it concerned a very serious matter which had caused losses to the plaintiff amounting to RM4,451,160.
- I [51] In his cross-examination, DW1 admitted that what had transpired in the instant case was the responsibility of the second defendant even though it was an unknown third party which had

caused the creation of the fake or fraudulent title in 2006 because the registration of the particulars in the second defendant's records was the responsibility of the second defendant.

[52] In his re-examination, DW1 reiterated that he had no personal knowledge of what had transpired in the instant case concerning the creation of the fake or fraudulent title in 2006, its discovery in March 2008, the subsequent entry of the Registrar's caveat on the fake or fraudulent title and the subsequent police report lodged by the Director of Lands & Mines concerning the fake or fraudulent title.

[53] Nevertheless, he was suddenly able to explain to the court how the fake or fraudulent title was wrongfully created in 2006 by the unknown third party. He said it was done not in accordance with the procedure, ie, by reference to another title which relates to the same lot. The court understood him to mean that the third party had created a new title number, ie, GRN 232 (instead of the original title number PN 20992) for the same lot, ie, Lot 349, Seksyen 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur.

[54] In answer to questions from the court he said that each officer had a password which had to be keyed into the system before the officer could access the database of the computerised system of registration in use at the registration division of the second defendant.

[55] However, DW1 informed the court that right until the day he was testifying in court, the Director of Lands & Mines still did not know the identity of the third person who had created the fake or fraudulent title. However, the court could not accept his evidence on this fact-in-issue because it was inadmissible by virtue that it is hearsay evidence as neither the second defendant nor the officer who was directly concerned with the matter was called to testify to support the defence of the second and third defendants that the fake or fraudulent title was in fact created by the unknown third party and the second defendant and/or his officers and/or staff could not have prevented the creation of the fake or fraudulent title despite having taken all the reasonable precautions to maintain the security of the computerised system and to ensure the accuracy of the particulars of the records kept and maintained by the second defendant pursuant to the provisions of the NLC 1965.

A Second And Third Defendants' Submissions

[56] Sixthly, I shall deal with the second and third defendants' submissions.

B [57] Madam Narkunavathy Sundareson, learned Senior Federal Counsel ("SFC"), for the second and third defendants submitted that the plaintiff's claim ought to be dismissed with costs on the following grounds:

- C** (1) The plaintiff bears the burden of proof pursuant to s. 101 of the Evidence Act 1950 but the plaintiff has failed to discharge its burden of proof on a balance of probabilities;
- (2) The plaintiff has failed to show that the second and third defendants owed him any duty of care under statute;
- D** (3) This is because the search which was conducted by the plaintiff was only a private search under s. 384 of the NLC 1965;
- (4) It was not an official search under s. 385 of the National
- E** Land Code 1965 (the "NLC 1965");
- (5) Hence, the second defendant did not issue any certificate under his hand and seal to the plaintiff concerning the identity of the registered proprietor of the land;
- F** (6) Hence, s. 386 of the NLC 1965, which provides for the payment of compensation in the event loss is suffered in reliance on the certificate of search issued, is inapplicable;
- (7) Therefore, the plaintiff is not entitled to be paid such
- G** compensation as may be agreed or determined in accordance with s. 434 of the NLC 1965;
- (8) The second defendant does not owe any duty of care at
- H** common law to the plaintiff because the express provisions of s. 386 of the NLC 1965 preclude the operation of the common law duty of care;
- (9) In any event, the second and third defendants cannot be
- I** held liable to the plaintiff for a sum of RM89,023.20 claimed because the plaintiff had paid the sum even before conducting the private search on the title of the land;

- (10) As for the remaining sum claimed of RM4,362,136.80, the second and third defendants cannot be held liable to the plaintiff for it because the evidence of payments of that sum claimed, which comprises a sum of RM356,092.80, a sum of RM1 million, a sum of RM506,044 and a sum of RM2.5 million (the “bank loan”), was adduced only in the form of copies of personal cheques issued by the plaintiff and thus it fell short of the standard required because there were no acknowledgements of those payments in the form of receipts produced before the court. A B
- (11) Clause 9.1.1 of the SPA expressly stipulates that the purchase price ought only to be released to the first defendant upon delivery of the relevant documents, ie, the issue document of title to the property, the current receipts for payments of quit rent and assessments payable in respect of the property, and any other document necessary to effect the registration of the purchaser as the proprietor of the property. C D
- (12) Hence, it was the duty of the plaintiff’s solicitors to obtain complete documentation before releasing the balance purchase price as per the SPA but it was not done; and E
- (13) Upon the discovery that the land did not belong to the first defendant, the plaintiff’s solicitors also did not mitigate the plaintiff’s losses because they did nothing to recover the monies already paid to the first defendant in order to mitigate the plaintiff’s loss. F
- [58] Learned SFC cited the decision of the English House of Lords in *Caparo Industries Plc v. Dickman and Others* [1990] 2 AC 605 in support of her submission that the second defendant did not owe any duty of care to the plaintiff in the instant case. G
- [59] Learned SFC distinguished the decision of the English Court of Appeal in *Ministry of Housing and Local Government v. Sharp and Another* [1970] 2 QB 223 (“*Sharp’s case*”) in order to support her submission that in the instant case the second defendant did not owe a duty of care to the plaintiff because the search which was requisitioned by the plaintiff’s solicitors on the title of the land on 18 September 2007 was a private search. H I

- A [60] Learned SFC also sought to distinguish the decision of the Malaysian Court of Appeal in *Pendaftar dan Pemeriksa Kereta-Kereta Motor Melaka & Ors v. KS South Motor Sdn Bhd* [2000] 2 CLJ 573; [2002] 2 MLJ 540 which was cited by learned counsel for the plaintiff in support of his submission that the second defendant owed a duty of care to the plaintiff and was negligent in issuing him a search result which was erroneous.

- C [61] The reason given by learned SFC was that it would be inherently and immensely dangerous to construe the provisions of the NLC 1965 with reference to another piece of legislation, ie, the Road Traffic Ordinance 1958, which have no corresponding provisions, ie, ss. 384, 385 and 386 of the NLC 1965.

Issues For The Determination Of The Court

- D [62] Seventhly, I shall deal with the issues which have arisen for the determination of the court in this suit.

- E [63] The issues as agreed between the three parties as per the “statement of issues to be tried” filed on 27 February 2012, encl. (37), are as follows:

- (1) On the pleaded case, is the second defendant in breach of its statutory duties under the National Land Code, 1965 and/or the Rules made pursuant thereto?
- F (2) Is the second defendant herein statutorily bound to maintain a register of all lands caused to be registered with the Land Registry, Wilayah Persekutuan, Kuala Lumpur?
- G (3) If the second defendant herein is so statutorily bound to maintain a register of all lands caused to be registered with the Land Registry, Wilayah Persekutuan, Kuala Lumpur, does the duty of the second defendant extend to maintaining such register that contains accurate details of the lands so registered and to be relied upon by any member of the public, seeking information in relation to such land as registered?
- H (4) Is the second defendant under a statutory duty to ensure that all information as conveyed to a paying member of the public for the procurement of the information as contained in the register, is accurate so as to enable the paying member of the public to conduct his private and commercial transaction in relation to the land in respect of which the information is sought?
- I

- (5) Is the plaintiff herein a person aggrieved by the facts of the register of the second defendant showing a title description of the land and the name of the registered proprietor thereof, differing from the particulars as shown in the register of the second defendant as at 18 September 2007, a date prior to the execution of the S & P agreement (the sale & purchase agreement) by the plaintiff? A B
- (6) On the pleaded case and on the totality of the facts of the matter, is the second defendant negligent in and about the performance of its statutory duty in and about the maintenance of the records of particulars of the land, which is the subject matter of the suit herein? C
- (7) Whether on the pleaded case, and on the totality of the facts of the matter, including the facts as admitted and/or facts which are indisputable, the plea of fraudulent title and/or the fraud on the part of any third party, can, either on the facts and/or in law, constitute a defence to the second and third defendants? D
- (8) Whether on the case as pleaded and on the totality of the facts of the matter herein, including the facts as supported by documents, the third defendant is vicariously liable for the breach of duty and thereby negligence on the part of the second defendant? E
- (9) Whether on the peculiar facts of the matter herein, s. 22 of the National Land Code 1965, can be of any avail to the second and third defendants to absolve themselves from liability to the plaintiff? F
- (10) If the second and third defendants are held liable (to the plaintiff) as claimed (by the plaintiff), the quantum of the damages as payable by them to the plaintiff in the circumstances and on the facts of the matter herein?" G

The Law

[64] Eighthly, I shall deal with the law. In *Caparo Industries Plc v. Dickman* [1990] 2 AC 605, the English House of Lords held that in order to determine the question of whether a duty of care exists, three questions have to be addressed. I

- A [65] The three questions which apply to the instant case are as follows:
- (a) whether the damage suffered by the plaintiff is reasonably foreseeable;
- B (b) whether there is a relationship of proximity between the plaintiff and the second and third defendants; and
- (c) whether it is fair and reasonable that the second and third defendants owe the plaintiff a duty of care.
- C [66] In my judgment, based on the agreed facts in the instant case, ie, that the second defendant is a public officer and an agent or servant of the third defendant herein and charged with the statutory duty to maintain a register of all lands caused to be registered at the Land Registry, Wilayah Persekutuan, Kuala Lumpur; that prior to the preparation and execution of the SPA
- D the plaintiff's solicitors had requisitioned, upon payment of the prescribed fee, for a land search to be conducted at the Land Registry, Wilayah Persekutuan, Kuala Lumpur for the purpose of ascertaining the true and actual description of the title to the land,
- E and also to obtain the particulars of the registered proprietor thereof; and as per the particulars of a search conducted in respect of the land on 18 September 2007 procured by the plaintiff's solicitors from the Land Registry, Wilayah Persekutuan, Kuala Lumpur, the description of the title to the land was given
- F as GRN 232, and the number of the Lot to which the said title relates was given as Lot 349, Seksyen 71, and the registered proprietor as the first defendant herein, all the three questions as laid down in the case cited above ought to be answered in the affirmative in favour of the plaintiff.
- G [67] Therefore, in my judgment, the second defendant owes a duty of care to the plaintiff to ensure that the register reflects the true and actual description of the title to the land and the true identity of the registered proprietor of the land.
- H [68] The reasons are as follows:
- (1) The system of land registration adopted by Parliament and codified in the NLC 1965 is based on the Torrens system of registration. The core principle of this system of registration is that the register is everything. "The Torrens system strives for simplicity and certitude in transfers of Torrens system land or registered land: *Oh Hiam & Ors v. Tham Kong* [1980] 1 LNS 53; [1980] 2 MLJ 159 at p. 164B, PC. Further, it seeks to get away from the complicated system of rules which in
- I

England regulate dealings in unregistered land, particularly those relating to such matters as notice of encumbrances and trusts: *Damodaram v. Choe Kuan Him* [1980] AC 497 at p. 502G, PC. Notwithstanding that these are Malaysian cases, the Torrens principles that were enunciated therein are of universal application throughout the Torrens world of registered conveyancing.” (per SY Kok in his preface in “*The Torrens System and Equitable Principles*”, Sweet & Maxwell Asia, Thomson Reuters, 2010).

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- (2) The second defendant knows and/or must be taken to know that the members of the public depend on him and his officers to ensure that what is contained in the register is correct and accurate since they have no other way or means of ensuring that they can obtain accurate and reliable information except from him and his officers.

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D

- (3) The second defendant also knows and/or must be taken to know that the members of the public require information in order to ensure that the person whose name and particulars are registered in the title is in law the registered proprietor of the land as they do not wish to make payment to and be cheated by a person who claims to be the owner of the land but turns out to be a bogus owner.

E

- (4) Therefore, by virtue of the relationship of proximity between the second and third defendants and the other members of the public who wish to search the register, upon payment of the prescribed fee, to obtain reliable and accurate information contained in the register it is reasonably foreseeable to the second and third defendants that if the register contains incorrect or inaccurate information or false information, there is a real risk and danger that the members of the public can suffer loss and damages as a result of relying on and acting on that information contained in the register.

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- (5) Therefore, it is fair and reasonable that the second and third defendants should owe the plaintiff a duty of care.

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- (6) Hence, the second defendant must take all reasonable steps to ensure that the register contains only correct, true and accurate information failing which the second defendant must be held to have breached his duty of care to the member of the public concerned and if the aggrieved person has suffered

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- A losses and is able to prove his losses which can be quantified and are not too remote then the second defendant is legally bound to compensate him.
- B (7) In the instant case, in my judgment there was a clear breach by the second defendant of the statutory duty imposed upon him by the NLC 1965 and he was clearly negligent because the search, *albeit* a private search, which was conducted pursuant to s. 384 of the NLC 1965, by the plaintiff's solicitors on 18 September 2007, disclosed that the first defendant was the registered proprietor of the land at the material time and the description of the title to the land was given as GRN 232, and the number of the Lot to which the said title relates was given as Lot 349, Seksyen 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur.
- C
- D
- E (8) The plaintiff has proved on a balance of probabilities that he has suffered losses amounting to RM4,362,893.24 as a result of the second defendant's negligence in not maintaining the accuracy of the information contained in the register because he has in his reliance on the untrue, incorrect and false information suffered losses totalling that amount based on the oral and documentary evidence adduced by the plaintiff in the full trial.
- F **Whether The Plea Of Fraudulent Title And/Or The Fraud On The Part Of Any Third Party (Who In The Instant Case Is Unknown) Can, Either On The Facts And/Or In Law, Constitute A Defence To The Second And Third Defendants?**
- G [69] In my judgment, this issue ought to be decided in the negative.
- [70] The reasons are as follows:
- H [71] In my judgment, since the identity of the fraudster remains a mystery even to the second defendant despite the lodging of the police report by the officer/servant of the second defendant on 27 March 2008 (which was not produced by the second and third defendants) and the police report lodged by the plaintiff (P12) on 4 June 2008, and there was no evidence from the second defendant that he and his officers have taken all the necessary precautions in order to prevent the fraudster, who has not been established by the second and third defendants to be in actual fact a third party instead of an officer/staff of the second
- I

defendant, from creating the fake or fraudulent title, the second and third defendants ought not to be allowed to invoke and to rely on the act or acts of the fraudster to protect the second defendant from liability from the plaintiff's claim. A

[72] To decide otherwise would be unfair and unjust to the plaintiff and other members of the public like the plaintiff who have had to suffer loss and damages through no fault of their own. This is especially so in the light of the positive admission of DW1 that what had transpired in the instant case was the responsibility of the second defendant even though it was an unknown third party which had caused the creation of the fake or fraudulent title in 2006 because the registration of the particulars in the second defendant's records was the responsibility of the second defendant. B C

Whether The Second And Third Defendants Can Rely On A Defence Which Was Not Pled In Their Amended Defence? D

[73] In my judgment, this issue ought to be decided in the negative.

[74] The reasons are as follows: E

[75] It is trite law that parties are bound by their pleadings.

[76] In my judgment, the failure or omission on the part of the second and third defendants to plead in their amended defence, that since the search which was conducted on 18 September 2007 was a private search under s. 384 of the NLC 1965 as opposed to an official search under s. 385 of the NLC 1965 the plaintiff's claim must fail because firstly, there is no duty of care owed to the plaintiff and secondly, the liability of the second and third defendants to pay compensation under s. 386 of the NLC 1965 is not triggered off, is fatal to them. F G

[77] The three sections are set out in Part Twenty-Seven of the NLC 1965 under the heading "Searches". They are reproduced below: H

PART TWENTY-SEVEN - SEARCHES

Private searches

384. Any person or body may, at any time during normal office hours of any Registry or Land Office, but subject to payment of the prescribed fee and such other conditions (if any) as may be prescribed, inspect and take notes of or extracts from: I

(a) any register of title, ...; and

A (b) ...

Official searches

385. (1) Any person or body may apply to the Registrar for an official search in respect of any land.

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(2) Any such application shall be accompanied by the prescribed fee, and the Registrar shall, as soon as may be after the receipt thereof, issue to the applicant a certificate of search under his hand and seal:

C

(a) specifying the person or body for the time being registered as proprietor of the land and, ...;

(b) ...;

(ba) ...;

D

(c) ...;

(i) ..;

(ii) ...; and

E

(iii) ...

Compensation

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386. Any purchaser of any alienated land, or any share or interest therein, who suffers any loss or damage by reason of any error in, or omission from, any certificate of search shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of section 434.

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[78] The court, therefore, agreed with Dato' N Chandran, learned counsel for the plaintiff, that it was too late in the day for learned SFC to raise this issue. Hence, her reliance on ss. 384, 385 and 386 of the NLC 1965 and the decision of the English Court of Appeal in *Sharp's* case, *supra*, is misplaced.

H

[79] The court noted that in *Sharp's* case the intending purchaser had requisitioned an official search under s. 17 of the Land Charges Act 1925. WAF Sharp ("Sharp"), who was at all material times clerk to the second defendant, the Hemel Hempstead Rural District Council (the "council"), being the local land charges Registrar for the area, carelessly conducted the official search on the register and issued a clear certificate of search to the intending purchaser, in which he did not mention the Ministry's charge, ie, a compensation notice.

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[80] Section 17(3) of the Land Charges Act 1925 expressly provides that in favour of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents whereof entries are required or allowed as aforesaid, the certificate, according to the tenor thereof, shall be conclusive, affirmatively or negatively, as the case may be.

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[81] Subsection (5) imposes criminal sanctions on any officer, clerk or person employed in the registry who “commits, or is party or privy to, any act of fraud or collusion, or is willfully negligent, in the making of or otherwise in relation to any certificate” under the section.

C

[82] The Ministry sued Sharp and the council for breach of statutory duty. The Ministry contended that but for the issue of the clear certificate the intending purchaser would have been liable, as a condition of carrying out the development, to repay to the Minister of Housing and Local Government the amount of the compensation referred to in the compensation notice. The compensation was paid by the Minister to the owner of the land due to the refusal by the second defendant to grant planning permission for the residential development of the land.

D

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[83] The English Court of Appeal unanimously held that since the intending purchaser had requisitioned an official search, Sharp owed a duty of care to the intending purchaser to ensure the accuracy of the official certificate of search issued by him after having made the search on the register. In coming to that conclusion the court held that Sharp owed a duty of care to the intending purchaser because the provision was enacted particularly for the benefit of a definable class of persons rather than the benefit of the general public.

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[84] Be that as it may, in my judgment there is no difference, and for that matter there ought to be no difference, in the relationship of proximity between the second and third defendants and a member of the public such as the plaintiff in the instant case, in a private search or in an official search, because the object or purpose of the search is the same in the instant case.

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[85] It is to ascertain the true and actual description of the title to the land and to obtain correct and accurate information of the description of the land, the title and the identity of the registered proprietor of the land. The person requisitioning the search or on

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A whose behalf the search is requisitioned intends to rely on such information in order to make an informed decision relating to the land, in particular, whether to purchase the land.

B [86] In my judgment, this is and ought to be the legal position because both provisions require the person who requisitions the search to make payment of a fee for that purpose. Hence the court rejected the submission of learned SFC that only in the case of an official search will the second defendant owe a duty of care to the person who requisitions the search or on whose behalf the search is being requisitioned.

C [87] I have arrived at this conclusion in the instant case because there was no attempt made by the second and third defendants' sole witness (DW1) to enlighten the court as to the difference, if any, between the nature of and the scope of work that is required to be and was in fact undertaken and carried out by the officer or staff concerned who had conducted the private search in the instant case as opposed to a case involving a public search.

D [88] The court was left with the clear impression that in both types of searches which can only be requisitioned upon the payment of the prescribed fee, the record to which the officer concerned would have access was the second defendant's data base in his computerised land search system. Hence, it would not have made any difference in the instant case whether the search which was made on 18 September 2007 by the plaintiff's solicitors was a private search under s. 384 of the NLC 1965 or an official search under s. 385 of the NLC 1965 as the result would have been the same.

E [89] This view of the court is fortified by the results of the official search carried out on 4 June 2008 on title GRN 232, Lot 349, as the results were similar to the results of the private search carried out on 18 September 2007 as both searches disclosed the registered proprietor of the land to be the Vendor.

F [90] Apart from that, there is nothing in s. 386 of the NLC 1965 which expressly excludes the liability of the second defendant in his official capacity in cases where the person who has requisitioned a private search has acted to his detriment in relying on the result of the search carried out by the officer or staff of the second defendant. The section merely provides that any purchaser of any alienated land, or any share or interest

therein, who suffers any loss or damage or damage by reason of any error in, or omission from, any certificate of search shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of s. 434. A

[91] In the absence of such a statutory exclusion clause, and since the NLC 1965 embodies the Torrens system of registration of land the second defendant must be held liable to the plaintiff for the losses suffered by the plaintiff flowing from the breach of the second defendant's duty of care to the plaintiff in the discharge and performance of the statutory duty which is imposed on the second defendant by the NLC 1965 to maintain a register of all lands caused to be registered at the Land Registry, Wilayah Persekutuan, Kuala Lumpur. B C

[92] Hence, I was of the respectful view that the decision of the Malaysian Court of Appeal in *Pendaftar Dan Pemeriksa Kereta-Kereta Motor Melaka & Ors v. KS South Motor Sdn Bhd supra*, could apply to the facts of the instant case although the law concerned was different because both sets of laws require the maintenance of a register by the authority concerned from which members of the public can obtain the requisite information to enable them to make an informed decision whether to make or continue a purchase. In the instant case, the decision relates to the purchase of land. In the above case, the decision relates to the purchase of a motor vehicle. D E

[93] I was of the respectful view that *Sharp's* case ought to be distinguished from the instant case on facts. F

Whether On The Peculiar Facts Of The Matter Herein, s. 22 Of The NLC 1965, Can Be Of Any Avail To The Second And Third Defendants To Absolve Themselves From Liability To The Plaintiff? G

[94] In my judgment, s. 22 of the NLC 1965 is inapplicable to the facts of the instant case and cannot avail the second and third defendants to absolve themselves from liability to the plaintiff. H

[95] The section reads as follows:

22. Protection of officers.

No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act. I

A [96] The reasons are as follows:

(1) The suit is brought by the plaintiff against the second defendant in his official capacity and not in his personal capacity.

B (2) This is clear from the description of the second defendant by reference not to his name but to his designated official position and office as the “Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur” in Malay which means “Registrar of Titles, The Land Registry, Federal Territory of Kuala Lumpur” in English.

C (3) Hence, upon an ordinary and literal construction and interpretation of s. 22 of the NLC 1965, the protection which is contained in that provision will only apply if the plaintiff had sued the second defendant in his personal capacity by citing his personal name.

D
Whether The Second And Third Defendants Are Liable To The Plaintiff For The Sums Of RM89,023.23 And RM356,092.80, Respectively, Which Were Paid Out By The Plaintiff To The first Defendant’s Solicitors Without Reliance On Any Search At The Office Of The Second Defendant?

E
[97] In my judgment, this issue ought to be decided partly in the negative and partly in the positive.

F [98] The reasons are as follows:

G (1) Since the first payment of RM89,023.23 (being the 2% of the purchase price) was made by the plaintiff even before he had conducted any search on the land at the office of the second defendant, it is crystal clear that he alone must bear his loss of the payment.

H (2) There is no way that the second defendant can be said to have been negligent because at that point in time, the plaintiff did not rely on any information whatsoever, let alone inaccurate or false or incorrect information provided by the second defendant, which could be said to have influenced or induced the plaintiff to act upon it to his detriment believing it to be true.

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(3) Therefore, the second and third defendants did not cause the plaintiff to suffer the loss of the first payment as they did not owe the plaintiff any duty of care let alone breach their duty of care to the plaintiff. A

(4) Since the second payment of RM356,092.80 (being the 8% of the purchase price) was made upon the execution of the SPA on 8 October 2007 (and the receipt of this sum has been expressly acknowledged by the first defendant in cl. 2.1.1 of the SPA) by the plaintiff after his solicitors had requisitioned the private search on the land on 18 September 2007 at the office of the second defendant, based on the reasons as stated above, the second and third defendants must bear his loss of the payment. B C

Whether The Plaintiff Has Succeeded In Proving On A Balance Of Probabilities That The Plaintiff Did In Fact Pay A Sum Of RM4,451,160 To The First Defendant Because No Receipts For The Payments Were Produced By The Plaintiff At The Trial? D

[99] Learned SFC has argued that since the plaintiff did not produce any receipts issued by the first defendant or the first defendant's solicitors for this sum of money which was paid on the following three occasions the plaintiff's claim for this amount must fail. E

[100] Learned plaintiff's counsel has argued that there is no necessity for the plaintiff to do that because there is no denial in the amended defence of the second and third defendants that this amount was not paid as claimed by the plaintiff in the latter's SOC. F G

[101] In my judgment, this issue ought to be answered in the affirmative in favour of the plaintiff.

[102] The reasons are as follows:

- (1) It is clear that before and during the full trial the plaintiff did not produce any receipt for any of the payments which he has said that he had made to the first defendant and he has merely relied on the copies of his four personal cheques which he had issued out to the first defendant's solicitors for the four amounts stated therein totalling a sum of RM1,951,160. H I

- A (2) As for the loan sum of RM2.5 million, he has said that this amount was released to the first defendant's solicitors.
- (3) The plaintiff has produced a letter from HSBC's solicitors dated 19 February 2008 stating that the loan sum was released to the first defendant's solicitors.
- B (4) The court noted that this case had undergone a number of case management sessions before it was finally set down for trial.
- C (5) Pursuant to O. 34 of the previous Rules of the High Court 1980 (the "RHC 1980") (which have since been repealed by the Rules of Court 2012 but which has a corresponding and even more detailed and elaborate O. 34), directions were given to the three parties to file various documents including the statement of issues to be tried in order to narrow down the issues so that the case could be disposed off expeditiously, justly and economically.
- D (6) Learned plaintiff counsel was correct in pointing out to the court that there is nothing in the statement of issues to be tried, filed on 27 February 2012, encl. (37), and marked "I" by the court, to require the court to determine whether the plaintiff had made the payments to the first defendant's solicitors as claimed by the plaintiff including the loan sum of RM2.5 million.
- E (7) The tenth or last issue to be tried relates only to the quantum of the damages which are payable by the second and third defendants to the plaintiff in the circumstances and on the facts of the matter herein, in the event that the second and third defendants are held liable by the court as claimed by the plaintiff.
- F (8) Hence, in my judgment, all the three parties are bound by the statement of issues to be tried by virtue of O. 34 of the RHC 1980 and the second and third defendants must be taken to have waived their right to insist that the plaintiff prove strictly that the payments were in fact made as claimed by him.
- G (9) In my judgment, learned counsel for the plaintiff was correct in submitting that learned SFC should have served on the plaintiff, a notice to produce the receipts for the payments and/or the plaintiff's bank statements to show that the
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monies had been debited from his account and/or the bank statements of the first defendant's solicitors to show that the monies have been credited into their client's account and/or their client's bank statements to show that the monies have been credited into their client's account, prior to the trial of the action.

- (10) In my judgment, since this was not done, it was too late in the day for learned SFC to take the plaintiff by surprise by raising the issue only during the trial.

Conclusion

[103] In my judgment, based on the reasons as set out above, issues 1 to 6 and 8, of the statement of issues to be tried, ought to be decided in the affirmative in favour of the plaintiff and issues 7 and 8 ought to be decided in the negative, also in favour of the plaintiff, and the court ought to have awarded a sum of RM4,362,893.24 to the plaintiff (instead of a sum of RM4,006,000.44 awarded by the court) as the damages in tort for the negligence of the second and third defendants, which have been proven to have been suffered by the plaintiff, with interest of 5% per annum with costs of RM100,000.

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